Bradley O. Van Ry, Esq.
Nevada State Bar No. 7198
2932 Moose Ridge Dr.
Reno, Nevada 89523
Tel: 775.225.5017
brad.vanry@yahoo.com
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CRYSTAL CARIEGA, individually and as mother and natural guardian of SEBASTIAN CARIEGA, SAMIRA CARIEGA, minors,

Plaintiffs,

vs.

CITY OF RENO, a political subdivision of the State of Nevada; LYNETTE JONES, in her individual capacity and official capacity as City of Reno Clerk, and DOE Defendants 1-10, inclusive,

Defendants.

Case No.: 3:16-cv-00562-MMD-WGC

PLAINTIFFS' RESPONSE TO DEFENDANT CITY OF RENO'S RULE 12(b)(6) MOTION TO DISMISS

COMES NOW, Plaintiffs, Crystal Cariega ("Ms. Cariega"), Sebastian Cariega and Samira Cariega, by and through their counsel of record, Bradley O. Van Ry, Esq., and hereby respond (Response) to Defendant City of Reno's (City) Rule 12(b)(6) Motion to Dismiss (Motion). This Response is made and based upon FRCP 12(b)(6), 12(d), 15(a), 56, all papers and pleadings on file herein and any other such evidence and/or argument that this Court deems necessary.

///

///

///

///

///

POINTS AND AUTHORITIES

1. Plaintiffs object to each and every document attached as an exhibit to the Motion.

The City attached four (4) exhibits to its Motion. Two (2) are City statutes, one (1) is a receipt for Ms. Cariega's payment on the underlying traffic citation and one (1) is the related Reno Municipal Court order dated October 30, 2014. Plaintiffs object and therefore none of those exhibits should be considered by this Court under FRCP 12(b)(6) and FRCP 12(d).

In fact, FRCP 12(d) provides that matters outside the pleadings brought before the Court at this time, and not excluded by the Court, converts this Motion to a motion for summary judgment under FRCP 56. In that instance, each of the parties, moreover, must be allowed to produce evidence in support of its case as a summary judgment matter. FRCP 12(d).

As indicated above, and because Plaintiffs object to the use of these exhibits as matters outside of the First Amended Complaint (FAC), ECF Document No. 1-2 (Doc. 1-2), Plaintiffs request that this Court exclude all four (4) of the City's exhibits for purposes of the City's current Motion. Should this Court want to treat the City's Motion as a summary judgment motion, Plaintiffs request that the Court so designate and provide the Plaintiffs time to provide their evidence against summary judgment in favor of the City pursuant to FRCP 12(d).

2. What the City of Reno is not requesting.

Significantly, the City of Reno is not requesting dismissal of all the counts under Plaintiffs' FAC. Doc. 1-2. In fact, there is no mention of Counts II-VII in the Motion by the City. Accordingly, all of Plaintiffs' counts are not at issue in the extant Motion and corresponding Response by Plaintiffs. Only Count I, the 42 U.S.C. 1983 count, is currently at issue.

3. Plaintiffs' Count I should not be dismissed under FRCP 12(b)(6).

3.1 Standard(s) for FRCP 12(b)(6) dismissal

This Court is familiar with the standard(s) applicable to the instant Motion. Only if no relief can be granted under any set of facts that could be proved in support of Plaintiffs' claim, and it appears to a certainty that no relief can be granted, can this Court grant the City's Motion. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9^{th} Cir. 1990). Further, all factual allegations in the

Plaintiffs' FAC must be deemed true and related inferences deemed true for purposes of ruling on the City's Motion. Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005).

Relatedly, if the Court dismisses Count I of the FAC, leave to amend the FAC should be granted to Plaintiffs. Steckman v. Hartman Brewing, Inc., 143 F.3d 1293, 1296 (9th Cir. 1998). Typically, this is true because no prejudice to the City would result and justice for Plaintiffs requires it. FRCP 15(a). So, even if this Court grants the City's Motion, leave to amend the FAC should be granted to the Plaintiffs.

3.2 The City erroneously asserts that Plaintiffs alleged vicarious liability.

Contrary to the City's assertion of alleged vicarious liability, Plaintiffs alleged wrongful act(s) against Lynette Jones, the City clerk at the time of these incidents, in her **individual** capacity as well as her official capacity. See Doc. 1-2, FAC, p. 2, lines 20-21. Further, Plaintiffs alleged wrongful act(s) by DOE defendants in **individual** and official capacities. Doc. 1-2, FAC, p. 3, lines 1-3. The City's claim for dismissal of Plaintiffs' Count I, therefore, must fail on this basis.

Relatedly, the City asserts that Lynette Jones is an incorrect defendant to this action based upon the separation of powers doctrine and related bureaucratic structure of the City's executive and judicial branches of government. The City, however, does not identify who the proper defendant is. That proper defendant is the municipal clerk for the City from January 2014 to October 2014. The City should disclose that information immediately to Plaintiffs in order to allow Plaintiffs to substitute the proper defendant in the place and stead of Lynette Jones and allow service of the FAC. Of course, Plaintiffs request, preemptively, leave to amend the FAC at such time as the City discloses that information. FRCP 15(a).

3.3 The City likewise wrongfully asserts that Plaintiffs failed to adequately allege facts of an official policy or custom that caused Plaintiffs' constitutional deprivation.

Again, and contrary to the City's assertions, Plaintiffs alleged abundant facts of policies and practices of the City that caused their constitutional injuries in the FAC. Plaintiffs alleged that the City is responsible for all of its policies, procedures and practices. Doc. 1-2, FAC, p. 2, lines 23-24. Plaintiffs alleged that the City failed to process payment of the traffic citation and/or quash the illegal arrest warrant in a timely and proper manner. Doc. 1-2, FAC, p. 3, lines 11-14. Plaintiffs alleged that the City used Ms. Cariega's Native American status as the basis for its failure to process payment of the traffic citation and/or quash the illegal arrest warrant in a timely and proper manner. Doc. 1-2, FAC, p. 3, lines 15-18.

Plaintiffs further alleged that the City and Lynette Jones engaged in a pattern and practice of not processing traffic citations and/or quashing illegal arrest warrant(s) of Native American and other minorities in a proper and timely manner. Doc. 1-2, FAC, p. 3, lines 19-21. Plaintiffs further alleged that the City and Lynnette Jones engaged in a systemic and reckless pattern and practice of not processing payment of the traffic citation(s) and/or quashing the illegal arrest warrant(s) in a timely and proper manner. Doc. 1-2, FAC, p. 3, lines 22-24. Finally, Plaintiffs alleged that City wrongfully withheld the citation amount from the bail even though the fine had been paid. Doc. 1-2, FAC, p. 5, lines 3-5.

All of the foregoing clearly demonstrates abundant factual allegations in the FAC of the City's official policies/procedures/practices to survive the City's Motion. The City's Motion, therefore, should be denied.

CONCLUSION

The City's Motion should be denied in its entirety. None of the City's exhibits attached to its Motion should be considered by this Court, and Plaintiffs object, because those exhibits raise items outside the pleadings at this point. Further, ample allegations against the City exist to survive the FRCP 12(b)(6) standard(s) in favor of Plaintiffs. Plaintiffs, additionally, did not assert vicarious liability in any instance as evidenced by the FAC, and Plaintiffs asserted multiple pattern/practice/official custom/official policy violations of the City in the FAC.

Accordingly, Plaintiffs request that the Motion be denied, but also request that should this Court dismiss Count I of the FAC, Plaintiffs be granted leave to amend the FAC to cure any deficiencies found. Plaintiffs also request leave of the Court to add the proper individual defendant in

///

///

///

///

the place and stead of defendant Lynnette Jones at such time as identified by the City.

Dated this 28th day of OCTOBER, 2016.

/s/ Bradley O. Van Ry

Bradley O. Van Ry
Nevada Bar No. 7198
2932 Moose Ridge Drive
Reno, Nevada 89523
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of BRADLEY O. VAN RY, ESQ., and that on this date I served a copy of the foregoing document, via CM/ECF electronic service, upon the following:

William E. Cooper, Esq.
Deputy City Attorney
Post Office Box 1900
Reno, NV 89505
Attorneys for City of Reno

DATED this 28th day of OCTOBER, 2016.

/s/ Christine L. Miller
Christine L. Miller